SHANTHI CHANDRASEKERAM
v.
D. B. WIJETUNGA AND OTHERS

SUPREME COURT
FERNANDO, J.
KULATUNGA, J. AND
WADUGODAPITIYA, J.
S.C. 1/92. 2/92, 3/92
4TH MAY, 1992.

Fundamental Rights – Reference to the Supreme Court by Court of Appeal on the ground that was prima facie of infringement of Articles 11, 13(1) and 13(2) in three ***habeas corpus*** *applications – Jurisdiction of Supreme Court in matters of infringement of fundamental rights.*

Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights; and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from the Supreme Court. On the other hand, there could be transactions or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141, and from this Court by a fundamental rights application under Article 126. Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical "causes of action" arising from the same transaction unless there is express provision permitting joinder. The prevention in such circumstances, of a multiplicity of suits (with their known concomitant) is the object of Article 126(3).

(2) The expression "such matter" in Article 126(3) does not refer to the question of infringement but to the entire application.

(3) Article 126(4) empowers the Supreme Court, if it finds that there was no infringement, to refer "the matter" back to the Court of Appeal. On the other hand, if the Supreme Court finds that, there has been an infringement, there is no requirement that the substantive writ application be sent back. The Supreme Court may determine that as well. It may be that in an appropriate case Article 126(4) may empower the Supreme Court to give a direction requiring the

substantive application to be determined by the Court of Appeal, perhaps after taking evidence. However Article 126(4) presupposes that the Supreme Court would, in general, determine the entire application. The "matter" thus means the application.

Since the word used in Article 126(3) is "matter" instead of "question", the Article 126(3) manifests an intention to refer to something other than a "question" and in the context this can only be the application itself.

The jurisdiction of the Supreme Court extends not only to the question of infringement, but to the entire application.

(4) The alleged infringement of Article 11 could not have been the basis of references under Article 126(3) firstly because there was only an assertion, and no *prima facie* evidence of such infringements, and secondly because there was no averment or evidence that the infringement were by a party to the habeas corpus applications.

(5) No valid reasons were given for the arrests and the arrests were in violation of Article 13(1).

(6) While the Court will not lightly interfere with the subjective opinion, *bona fide* held, of the competent authority, that is not to say that the Court will surrender its judgment to that of the Executive, for that would imperil the liberty of every citizen. Sufficient material must be placed before the Court to satisfy the Court that the deprivation of liberty, not limited in point of time, was not arbitrary, capricious or unreasonable. The unexplained failure of the respondents to place any material whatsoever leads but to one conclusion, that there was no such material, and therefore that the Detention Orders were unreasonable and void.

Cases referred to:

1. *Hirdaramani v. Ratnavel* 75 NLR 67
2. *Wickremabandu v. Herath* [1990] 2 Sri L.R. 348.

Reference to the Supreme Court under Article 126(3) of the Constitution.

Faiz Mustapha, P.C. with *Motilal Nehru, P.C.*
Jayampathy Wickremaratne, R. Marzook and *A. Vinayagamoorthy* for petitioners in References 1/92 and 3/92.
D. W. Abeykoon, E. Thambiah, Nimal Punchihewa,
A. Vinayagamoorthy, S. G. Punchihewa, Miss C. Jayalath and *S. Thevarajah* for the petitioner in Reference 2/92.

Hector Yapa, Deputy Solicitor-General for respondents.

Cur. adv. vult.

29th June, 1992

FERNANDO, J.

These three matters have been referred to this Court under Article 126(5) of the Constitution. Article 126, having conferred on the Supreme Court "sole and exclusive jurisdiction to hear and determine any **question** relating to the infringement or imminent infringement by executive or administrative action, of any fundamental right", goes on to provide:

> "(13) Where in the course of hearing in the Court of Appeal into an **application** for orders in the nature of a writ of *habeas corpus, certiorari, prohibition, procedendo, mandamus,* or *quo warranto,* it appears to such Court that there is *prima facie* evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such **matter** for determination by the Supreme Court."
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> "(14) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the **matter** back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."

In the course of hearing habeas corpus applications filed by the three Petitioners in August 1991, the Court of Appeal considered that there was *prima facie* evidence of the infringement of Articles 11, 13(1) and 13(2), and made these References on 13.1.1992.

Preliminary Questions

Two preliminary questions arose in regard to the nature of the jurisdiction and powers of this Court upon a reference under Article 126(3): firstly, whether upon such reference this Court was required to determine the application, including the question of the infringement of fundamental rights, or *only* the latter question; and secondly, whether a reference was permissible only in respect of an infringement having a close connection with the facts and grounds

which gave rise to the principal application (the habeas corpus application in this instance), or even in respect of an infringement having no such nexus.

1. If Article 126(3) is considered in isolation, "such **matter**" may be understood to refer either to the writ **application,** or to the **question of infringement** (of which there was *prima facie* evidence). However, for several reasons, I am of the view that this expression does not refer to the **question** of infringement, but to the entire application.

Article 126(4) empowers this Court, if it finds that there was no infringement, to refer "the **matter**" back to the Court of Appeal. Thus if the **question** whether there was an infringement is answered in the negative, the **matter** must be sent back to the Court of Appeal; obviously, that **matter** cannot be the **question** of infringement, which has already been decided, but that which yet remains to be determined, namely the **application.** On the other hand, if this Court finds that there has been an infringement, there is no requirement that the substantive writ application be sent back; hence this Court must determine that as well. It may be that in an appropriate case Article 126(4) may empower this Court to give a direction requiring the substantive application to be determined by the Court of Appeal, perhaps after taking evidence. However, Article 126(4) presupposes that this Court would, in general, determine the entire application. The "**matter**" thus means the "**application**".

Other provisions reinforce this view. Where in the course of proceedings in any court or tribunal any "question" of interpretation of the Constitution arises, Article 125(1) requires such "question" to be referred to this Court. Similarly, Article 126(1) refers to any "question" relating to the infringement of a fundamental right. By using the term "matter" instead of "question", Article 126(3) manifests an intention to refer to something other than a "question", and in the context this can only be the application itself. Article 128(1) refers to a "**matter** or proceeding" involving a "**question**" of law, again pointing to a difference between the two expressions; thereby confirming that

"matter" refers to the entire subject-matter of the litigation rather than to a mere question or issue arising therein.

I therefore hold that our jurisdiction extends not only to the question of infringement, but to the entire application.

2. It is possible that a party to a writ application may raise questions of violation of fundamental rights totally unconnected with the substance of that application. However any such question would be irrelevant to the determination of such application, and the Court would have to refrain from considering or adjudicating upon such question as it could have no relevance to its ultimate order. In my view it is not to such questions that Article 126(3) refers, but to a question of infringement **properly** arising in the course of hearing a writ application, just as Article 125(1) would apply to a question relating to the interpretation of the Constitution, **properly** arising in the course of the proceedings of any court or tribunal, and not one which is irrelevant or of purely academic interest.

Article 126(1) confers sole and exclusive jurisdiction in respect of infringements of fundamental rights, and Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from this Court. On the other hand, there could be transactions or situations in which, on virtually the same facts and grounds, a person appears entitled to claim relief from the Court of Appeal through a writ application under Article 140 or 141, and from this Court by a fundamental rights application under Article 126. Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical "causes of action" arising from the same transaction, unless there is express provision permitting joinder. The prevention, in such circumstances, of a multiplicity of suits (with their known concomitants) is the object of Article 126(3).

Infringement of Article 11

Each of these habeas corpus petitions was filed by the wife of the detenu concerned, and each Petitioner expressed "fear for the life and limb of the corpus", who was being kept incommunicado. The Court directed that Attorneys-at-Law and relatives be given access, and thereafter each of the three detenues filed affidavits making the following allegations of torture:

> "I was blindfolded for 3 days after my arrest and subjected to torture and cruel, inhuman and degrading treatment. I still have a healing wound on my nose."
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> " . . . after I was arrested I was blindfolded and subjected to torture and cruel, inhuman and degrading treatment. At one stage when I was mercilessly assaulted I became [sic]"
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> " . . . I was blindfolded continuously for three days and kept in the record room of the Dematagoda Police Station and subjected to torture and cruel, inhuman and degrading treatment after I was taken into custody."

These are assertions of "torture and cruel inhuman and degrading treatment"; specifically, however, what is alleged is blindfolding, and by the 3rd detenu, a "merciless assault" with unstated consequences. No particulars have been given as to the nature of the treatment; there was no attempt to identify the persons responsible and there is no suggestion that any of the Respondents were involved. Reports later made by the J.M.O. set out the examinee's history as related by him; although some particulars have been stated therein, the detenues have not, in subsequent affidavits, sworn to those matters.

The alleged infringements of Article 11 could not have been the basis of references under Article 126(3), firstly because there was only an assertion, and no *prima facie* evidence of such infringements,

and secondly because there was no averment or evidence that the infringements were by a party to the habeas corpus applications.

The Petitioners are not entitled to relief in respect of the alleged infringements of Article 11.

Arrest and detention in breach of Article 13

According to I.P. Devasurendra, O.I.C. Crime Detective Bureau, Slave Island, on information received in the course of investigations into the bomb blast at the J.O.C. Headquarters, he arrested S. Balachandran of Kotahena; in consequence of information received from Balachandran, he proceeded to Talawakelle, on 3.7.91, and arrested the three detenues at the office of the Upcountry People's Front, a political party. Chandrasekeram (the "1st detenu") was the President, both of that party, and of a registered trade union, the "Upcountry Workers' Front". Tharmalingam (the "2nd detenu") was a school Principal and an elected member of the Nuwara Eliya Pradeshiya Sabha; he was the Vice-President of that party. Bawa Abdul Cader (the "3rd detenu") was the Secretary of both the party and the trade union. According to the affidavits filed by the wives of the 1st and 3rd detenues, they had been arrested on 3.7.91 at 7.30 p.m. at the Talawakelle Police Station. In his own affidavit, the 1st detenu says that at about 7.30 p.m. he was asked to come to the Talawakelle Police Station, that from there he went to Colombo in a private vehicle, and that he was arrested only on 4.7.91 at Colombo; the 3rd detenu confirms his wife's version. In her original affidavit, the 2nd detenu's wife stated that he had been arrested on 3.7.91 at his house; in her second affidavit, she stated that he was arrested at the Talawakelle Police Station at 8.00 p.m., and this is supported by his own affidavit. In view of these conflicting affidavits, it appears more likely that the detenues had been arrested on 3.7.91 at Talawakelle, probably at the party office.

Devasurendra says that he informed the detenues of the reasons for their arrest, but he has not disclosed those reasons in his affidavits; the detenues state that no reasons were given. Since the information obtained by him from Balachandran and others has also not been disclosed, I am unable even to draw any inference as to those reasons. Devasurendra further states that on being questioned

each of the three detenues had admitted "his links and participation in giving protection to Nadarajah Varadan, one of the main suspects in the said bomb blast", and that "on information provided by them [he] managed to surround the safe house of Varadan during the same night"; but their statements have not been produced. This is denied by the detenues; the 3rd detenu admits that he knew Varadan; the 2nd detenu admits that he gave all necessary assistance and information to the police, and assisted them to trace the house where Varadan stayed. The only material before us in regard to any link between the detenues and Varadan is that the 2nd detenu knew him to be a "paper reporter"; if so, it would not have been unusual or suspicious for Varadan to have had contacts with the political party and the trade union in the course of his legitimate journalistic activities. To avoid arrest, Varadan swallowed a cyanide capsule and committed suicide. In these circumstances it is probable that some reason was given by Devasurendra for the arrest of the detenues, but what that reason was I cannot say. Since the Respondents have not produced any of the contemporaneous documentary material, (such as notes of investigation and the statements of Balachandran and others, and even of the detenues), it is not possible for me to come to any finding that there was credible information or a reasonable suspicion that the detenues were in any way involved in criminal activity, or that valid reasons were given for their arrest. It may well have been the case that the premature disclosure of such material might have been prejudicial to the investigations into the J.O.C. bomb blast, or to national security. However, that position was never taken up by the Respondents; it could not have been taken up at the hearing, for by that time, we were told, indictments had been filed in the High Court of Kandy, in which event much of that material would have been disclosed there. I therefore hold that their arrests were in violation of Article 13(1).

It does not necessarily follow that their subsequent detention was unlawful. The successful tracing of Varadan, Varadan's suicide by means of a cyanide capsule, and the (alleged) admissions that they had links with Varadan, may well have justified the detention of the detenues for a short period pending further investigation, if there had been some evidence of criminal activity by Varadan. Detention Orders under Emergency Regulation 19(2) were issued by S.P.,

Crime Detective Bureau, on 4.7.91 authorising the detention of all three detenues for 90 days for the purpose of further investigations. The detenues were duly produced before a Magistrate within 30 days. Upon the expiry of that period, Detention Orders under Emergency Regulation 17 were issued by the Secretary, Defence, on 1.10.91; learned Counsel for the Petitioners concentrated their attack on these Orders. In his affidavit dated 11.10.91, the 2nd Respondent (Director, Crime Detective Bureau) claimed that as this was the first occasion on which "the Police had arrested an upcountry politician involved in harbouring L.T.T.E. cadres, it was necessary to investigate the involvement of the said organisation and the leaders including the [detenues]", and "since the [detenues were] involved in Estate Unions it is not possible to expedite an investigation due to lack of information received by the investigators". He added that the "investigators are taking all steps to complete the said investigation within a reasonable period, and therefore . . . the detention of the [detenues] . . . is helpful to continue with the said investigation"; and "after submitting facts before the Secretary to the Ministry of Defence, the Secretary had authorised the detention of the [detenues]" under Emergency Regulation 17(1). Those Detention Orders were issued, **after** the habeas corpus applications were filed, on 1.10.91. We do not know what "facts" were submitted to the Secretary, Defence, nor do we have an affidavit from him (or anyone else) as to the material on the basis of which he formed the requisite opinion under Emergency Regulation 17, or explaining how or why he formed that opinion. After these References were made, the 2nd Respondent filed a further affidavit dated 14.4.92 in this Court, but furnished no clarification. While this Court will not lightly interfere with the subjective opinion, *bona fide* held, of the competent authority (see *Hirdaramani v. Ratnavale*,[1] *Wickremabandu v. Herath*,[2]) that is not to say that this Court will surrender its judgment to that of the Executive, for that would imperil the liberty of every citizen. Sufficient material must be placed before the Court to satisfy us that the deprivation of liberty, not limited in point of time, was not arbitrary, capricious or unreasonable. The unexplained failure of the Respondents to place any material whatsoever leads but to one conclusion, that there was no such material, and therefore that the Detention Orders were unreasonable.

For these reasons at the conclusion of the hearing, on 4.5.92, we held that the Detention Orders were void. As the proceedings in the High Court of Kandy were scheduled to commence on 18.5.92, Counsel agreed that the question of custody pending trial should be determined by the High Court and that (as they had no desire to avoid standing trial) the detenues may remain in the custody of the Respondents until they were produced in the High Court on 18.5.92. It was further agreed that if indictments were duly filed and served on them, the question of their custody pending trial according to law, should be determined by the High Court, and that if such indictments were not filed or served on or before 18.5.92, the detenues would be released forthwith. We therefore did not have to consider making an order for the release of the detenues, but directed the Respondents to release them forthwith if no such indictments were filed and served.

I grant the Petitioner in each case a declaration that the detenu had been arrested in violation of Article 13(1), and detained in violation of Article 13(2). I order the State to pay to each Petitioner, on behalf of the detenu concerned, a sum of Rs. 2,500/- as compensation and Rs. 2,500/- as costs.

In respect of the Habeas Corpus applications, I confirm the direction to the Respondents to produce the detenues before the High Court of Kandy to enable that Court to determine their custody pending trial, according to law, and to release them forthwith if indictments have not been filed and served on or before 18.5.92.

KULATUNGA, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Petition granted.